

# **LARGE & MIDSIZE BUSINESS DIVISION (LMSB)**

## **OFFICE OF TAX SHELTER ANALYSIS**

### *Mandatory Information Document Request FAQs – July 15, 2002*

1. Q. Should this IDR be issued to C corporations only, or does it apply to S corporations and partnerships, as well?
  - A. The IDR must be issued in all LMSB “C” Corporation examinations, including limited scope examinations. It may also be issued in examinations of “S” Corporations, Partnerships, and all other entities subject to LMSB jurisdiction. Team managers may exercise discretion in situations where the IDR should be modified or not issued, based on unique facts and circumstances, and are encouraged to consult with the Office of Tax Shelter Analysis (OTSA) at: [otsa@irs.gov](mailto:otsa@irs.gov)
2. Q. When should the IDR be issued?
  - A. The IDR must be issued at the commencement of all newly started LMSB “C” Corporation examinations and must be re-issued each subsequent cycle. It should also be issued during examination of cases already in progress. Exceptions to this latter requirement would be in situations where the examination is in its closing stages. Team managers should exercise judgement on a case by case basis regarding these exceptions.
3. Q. In a Coordinated Issue Case (CIC) just ended, I had issued the mandatory IDR and the taxpayer had indicated a negative response. I am now planning to begin auditing the subsequent cycle. Do I have to issue the Mandatory IDR again?
  - A. Yes. The mandatory IDR must be issued in every LMSB examination in each and every cycle, regardless of the taxpayer’s response in the previous cycle. Each cycle stands on its own and the IDR must be re-issued at the beginning of each new examination and in every new cycle.
4. Q. Does the Service have standard procedures for issuing a new IDR after a new listed transaction is identified?
  - A. As additional tax shelter vehicles are identified, the IDR will be updated and posted on the OTSA intranet website. The OTSA web site may be accessed at <http://lmsb.irs.gov/hq/pftg/otsa/index.htm>.

5. Q. As additional notices are issued, should examination teams be issuing additional or supplemental IDRs?

A. Yes, team managers should issue additional or supplementary IDRs whenever new notices are issued. However, in unique circumstances, team managers may also exercise discretion and not issue a supplemental or additional IDR. Any decision should be guided by the stage of the examination, the nature of the response received to the first inquiry, and other information otherwise available to the team manager. If, after weighing all the information available, the team manager has reason to believe that the taxpayer has not engaged in shelters other than those already queried, the team manager may decide not to issue additional IDRs.

6. Q. If the taxpayer accuses the agent of being on a fishing expedition due to the volume of the request and refuses to provide all of the information requested in the pro-forma IDR, how vigorously should the agent pursue the matter? If a summons is issued will counsel take enforcement action?

A. Issuance of the IDR is necessary to determine whether the taxpayer has engaged in tax shelter activities. The request is sufficiently specific to permit the taxpayer to ascertain the nature of the information requested. Should the taxpayer decline to respond or provide only a portion of the information requested, the team manager must decide if a summons will be issued. In arriving at this determination, the team manager should consider how forthcoming the taxpayer has been on other requests, the likelihood that the taxpayer is engaged in tax shelter activity and the impact of disparate treatment amongst similarly situated taxpayers.

In those situations where the taxpayer's response is unacceptable, the team manager should elevate the matter up the local chain of command and consult with local counsel regarding the issuance of a summons. As tax shelters are designated a top priority for the Service, non-compliance by the taxpayer should be dealt with urgently and aggressively.

7. Q. Following Announcement 2002-2 some taxpayers indicated they wanted to make disclosures, but were concerned that the production of certain documents and opinions might be a waiver of the attorney-client privilege. In response, the Service crafted an agreement stating it would not assert that the production of documents under the announcement caused a waiver of privilege. Are there similar procedures in place for documents provided in response to this IDR?

A. There is no similar procedure for documents furnished in response to this IDR. The response to questions raised by the taxpayer regarding attorney-client privilege should be coordinated with local counsel. [Note that the privilege

agreement referred to in the question was not a concession that a claimed privilege applied. The agreement also explicitly left open the ability of the IRS to argue that the claimed privilege did not apply for another reason.]

8. Q. If a team was already aware of specific tax shelter transactions that the taxpayer had engaged in, would it be permissible to modify the IDR to exclude those items? If not excluded, the taxpayer may accuse the team of making duplicate requests?

A. The request may be modified to exclude specific transactions that the team is aware of. This should be done either by way of a footnote to the IDR, by way of a cover letter or by way of dialogue with the taxpayer before the IDR is issued. However, the specific type of listed transaction should not be eliminated from the IDR. There is a possibility the taxpayer may have engaged in multiple transactions of a similar type.

9. Q. Should the IDR request an interview with the key players in any identified transaction because of the advantage of a face-to-face discussion over a written response? If so, who should be interviewed?

A. The IDR requests the taxpayer to provide a “list of all participants and their roles in the transaction, as well as the names and job titles of corporate officers or employees who would be available to meet with Service personnel. This request implies that the Service would like to know the identity of those individuals who have first hand knowledge of the transactions. When evaluating the transactions, the team may determine that it is advisable to conduct interviews of those involved. Whether or not the list of names is returned by the taxpayer, examiners should consider interviews of the chief financial officer, chief executive officer, board members and others who would customarily make investment decisions.

Also, when evaluating the taxpayer’s response, the team may wish to consider whether or not the taxpayer has made reasonable efforts to determine its use of, and participation in, tax shelters. The team may interview such taxpayer personnel as it deems necessary to achieve that assurance.

10. Q. The IDR requests information for “any transactions that are the same as, or substantially similar to any listed transactions”. Taxpayers appear to be interpreting any difference between their facts and those of the listed transactions as justifying the withholding of information. Is there some way to clarify what is a substantially similar transaction?

A. Some taxpayers and promoters have interpreted the “substantially similar” standard in an overly narrow manner to avoid disclosure. Some have made subtle or insignificant changes to a listed transaction in order to claim that their transactions are different and do not require disclosure. Treasury Decision 9000, issued June 14, 2002, modified regulation sections 1.6011-4T and 301.6111-2T to

clarify that the term “substantially similar” includes any transaction that is expected to obtain the same or similar types of tax benefits and that either is factually similar or based on the same or similar tax strategy. Further, taxpayers are cautioned that the term “substantially similar” must be broadly construed in favor of disclosure. The IDR has been revised to ensure that taxpayers broadly construe the term “substantially similar”.